Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Application by Verizon New Jersey	)	
Inc., Bell Atlantic Communications,	)	
Inc. (d/b/a Verizon Long Distance),	)	CC Docket No. 01-347
NYNEX Long Distance company	)	
(d/b/a Verizon Enterprise Solutions),	)	
Verizon Global Networks Inc., and	)	
Verizon Select Services Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in New Jersey	)	

COMMENTS ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE IN OPPOSITION TO THE APPLICATION OF VERIZON NEW JERSEY FOR AUTHORIZATION TO PROVIDE IN-REGION, INTERLATA SERVICES IN NEW JERSEY

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SUMMARY

Telecommunications competition in New Jersey is weak and diminishing, with many competitive carriers going bankrupt and still others exiting the market. As this dispiriting downward spiral plays out, Verizon's co-CEO characterizes as a "joke" the fundamental mechanisms of the Telecommunications Act of 1996, and other Verizon executives call for higher barriers to competitive entry. Despite all this, in this proceeding Verizon-NJ has requested authority under section 271 of the 1996 Act to offer in-region, inter-LATA service in New Jersey, where competition is significantly weaker than in any of the other states where such requests on Verizon's part have succeeded. The Commission should deny that request.

Verizon-NJ has failed in at least three areas to carry the burden of proof established for its request. Verizon-NJ has not established its compliance with Track A, which requires, among other things, that Verizon-NJ demonstrate that competitors are actually serving New Jersey's residential local exchange market over their own facilities. Verizon-NJ has also failed to establish that it provides non-discriminatory access to UNEs in compliance with item ii of section 271's competitive checklist. Finally, and significantly, Verizon-NJ has utterly failed to prove that granting its request would be in the public interest, and in particular has not proven either that there is local competition today or that competition will improve after a grant of 271 authority.

Verizon-NJ fails the Track A requirement on several grounds. Verizon-NJ does not prove that facilities-based residential competition exists in New Jersey, and the "evidence" that Verizon-NJ does provide does not demonstrate that more than a *de minimis* number of residential subscribers receive service from facilities-based competitors. In addition, Verizon-NJ provides no evidence that the service it claims is being provided is being offered for a fee. For these

reasons, Verizon-NJ fails to meet the requirements of Track A, and its Application should be denied.

Verizon-NJ has fallen short of its burden under item ii of the competitive checklist in two areas. First, it has not established either that its OSS provides non-discriminatory access to UNEs. Despite the importance of OSS to non-discriminatory access to UNEs, Verizon-NJ's Application provides no evidence of actual commercial testing of its OSS systems. Verizon-NJ relies instead on KPMG's OSS test results. The KPMG tests are inherently incapable of demonstrating that Verizon-NJ's OSS will function properly under real-world demands and conditions. In addition, Verizon-NJ's omission of data relevant to the KPMG performance metrics establishes that the KPMG results are flawed and unacceptable on their own terms.

Second, Verizon-NJ has failed to show that its UNE rates satisfy the checklist. In particular, Verizon-NJ has not yet implemented all the TELRIC-compliant rates that it claims satisfy its burden under checklist item ii. Moreover, the Commission can properly judge "successful implementation" only through experience of the TELRIC-compliant UNE rates by competitors and consumers; this has not yet occurred. Finally, it appears that Verizon-NJ has failed to meet the conditions set by the New Jersey Board of Public Utilities for implementing its UNE rates.

The Ratepayer Advocate urges the Commission to give particular attention to the public interest inquiry required by Section 271, and to carefully analyze whether New Jersey's markets are now competitive or could be expected to become competitive after a grant of 271 authority. The recent decision of the D.C. Circuit in the Commission's Kansas/Oklahoma 271 proceeding establishes the vital role competitive analysis and a public interest inquiry should play here. In the case of this Application, that analysis can only show that there is no competition in New

Jersey's residential local exchange market, and no evidence of the geographic distribution of the residential competition that Verizon-NJ claims to see in New Jersey.

Finally, to promote the public interest in competitive telecommunications markets in New Jersey, the Commission should refuse section 271 authority unless Verizon-NJ agrees to structural separation or functional/structural separation under a strong code of conduct. Structural separation is the only proven remedy for the anticompetitive incentives and abilities built into Verizon-NJ's operations, and it is a remedy that the New Jersey Board of Public Utilities is fully capable of administering.

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NYNEX Long Distance company	)	
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COMMENTS ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE IN OPPOSITION TO THE APPLICATION OF VERIZON NEW JERSEY FOR AUTHORIZATION TO PROVIDE IN-REGION, INTERLATA SERVICES IN NEW JERSEY

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") hereby submits these comments in opposition to the Application by Verizon New Jersey Inc. ("Verizon-NJ"), Bell Atlantic Communications, Inc., Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey filed with the Federal Communications Commission ("FCC") on December 20, 2001 ("Application").

* * *

The Ratepayer Advocate, established in 1994 through enactment of Governor Christine Todd Whitman's reorganization plan, represents and protects the interests of all New Jersey utility consumers – residential, small business, commercial and industrial – in all policy matters, including rate issues, that will affect the provision of telecommunications, energy, water and

wastewater services.[1] The Ratepayer Advocate's prime mission is to ensure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory.[2] In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition.[3]

[1] Declaration of Ratepayer Advocate Blossom A. Peretz ("Peretz Declaration") ¶¶ 1-2 (Attachment 1).

[2] *Id.* ¶ 1.

[3] *Id.* ¶ 2.

The position of the Ratepayer Advocate is clear. We welcome Verizon New Jersey's entry into the long-distance market – when the time is right for consumers. Unfortunately, the time is not ripe now because competition does not yet exist in the local telephone market. Consumers do not have affordable choice – in fact, they do not have any choice – for their basic local telephone service.[4]

INTRODUCTION

A NEW YORK TIMES headline on Saturday, December 15, 2001, read *Verizon Seeks Advantage Over Small Competitors: Wants to Charge More to Lease Phone Lines.*[5] The article reported that Verizon is lobbying state regulators in Albany, New York, to increase rates for competitors "to lease space on its networks," because of "new security needs." More importantly, Verizon has asked federal regulators "to make it more difficult for competitors to lease space on its network, arguing that its success in restoring phone service in Lower Manhattan proves that only a big company could handle maintenance, recovery and security in the wake of such a disaster."[6] The article went on to say that since September 11, Verizon executives have been arguing that "all competitors should eventually be forced to build their own networks."[7] Indeed, according to another account, Mr. Ivan Seidenberg, the co-chief executive of Verizon, in mid-September called "this whole scheme of CLEC interconnection a joke."[8] Based on THE NEW YORK TIMES article, Mr. Seidenberg specified "that he would welcome competition from companies with the same scale as Verizon, but that smaller ones that lease lines on a local carrier's network" could not cope with security or recovery requirements. In

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[4] Application, App. B, Tab 5, *Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Services in New Jersey*, Docket No. TO01090541 ("BPU 271 Proceeding"), 11/05/01 Hearing Transcript, T.17:21-18:6 (opening statement of Ratepayer Advocate Blossom A. Peretz); *see* Blossom A. Peretz, Op-Ed, *A Premature Filing*, THE RECORD, Jan. 8, 2002, at L13 (Attachment 2).

[5] Jayson Blair, *Verizon Seeks Advantage Over Smaller Competitors: Wants to Charge More to Lease Phone Lines*, THE NEW YORK TIMES, Dec. 15, 2001, at D3 (Attachment 3).

[6] *Id.*

[7] *Id.*

response to Mr. Seidenberg's allegations, according to the article, small telecommunications companies argued that Verizon was attempting to gain competitive advantage from the September 11th events with an ultimate goal of returning to the unchallenged state of local monopoly that preceded the passage of the Telecommunications Act of 1996[9] ("1996 Act").

On that same day in an Op-Ed article in THE NEW YORK TIMES, economist Vijag Vaitheeswaran analyzed the impact of the collapse of Enron on the regulatory framework in the energy marketplace.[10] He cautioned regulators that the Enron collapse should not portend the return to a regulated energy market, but instead that "deregulation, carefully monitored, remains sound policy."[11] He explained that:

> [e]xperience in other nations shows that competition in energy works if there is a strong, but carefully circumscribed, role for regulators – especially during the heady, uncertain transition phase.[12]

The Ratepayer Advocate was astounded to learn of the views of Verizon's CEO.[13] He attacks the very core of Congress' intent in its passage of the 1996 Act – to provide incentives for a robust competitive marketplace with opportunities and incentives for all companies, not just those that might be large and powerful enough to match the advantages Verizon enjoys due to its monopoly status, and to bring choice for all classes of consumers.

The 1996 Act requires the Commission to examine whether the local telecommunications market is irreversibly open to competition in order to evaluate Verizon-NJ's section 271

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[8] James K. Glassman, Op-Ed, *Verizon Exploited a National Tragedy*, THE WASHINGTON TIMES, Oct. 23, 2001 at A19 (Attachment 4).

[9] 47 U.S.C. §§ 151 *et. seq.*, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] Vijag Vaitheeswaran, Op-Ed, *Electricity Deregulation is Still Sound Policy*, THE NEW YORK TIMES, Dec. 15, 2001, at A31 (Attachment 5).

[11] *Id.*

[12] *Id.*

[13] *See* Blair, *supra* note 5.

application. As the Deputy Assistant Attorney General for economic analysis in the Antitrust Division of the U.S. Department of Justice stated last week, this examination is necessary to "untangle" the complex factors regarding whether the local market is open to competition.[14] Because of the complexity of this analysis and the limited usefulness of data generally provided by both incumbents and competitors, the Antitrust Division is asking carriers to provide better data and is considering conducting open-ended workshops beginning in late March or April.[15]

With the analysis both critical and complex, it is essential that the Commission get the analysis right. As former Commissioner Susan Ness explained just last week in commenting on Verizon-NJ's Application, "if it goes wrong, a state's consumers may lose the lower prices, increased investment, innovation, and other benefits of competition – forever."[16] Thus, until Verizon-NJ has demonstrated that it has opened its local market, it should not receive long distance authority.[17]

Unfortunately, the New Jersey local market is not irreversibly open to competition. Rather, today Verizon-NJ still retains monopoly control, particularly in the residential market. Competitive carriers provide local service to less than two percent (2%) (*i.e.*, less than 58,000) of the approximately 4.4 million residential access lines in New Jersey.[18] At most, 850 of these residential lines are provided by competitors using their own facilities.[19] Indeed, when a Ratepayer Advocate staff member attempted to obtain local residential service from competitive

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[14] *DOJ Seeks to "Untangle" Factors Impacting Competition*, TR DAILY at 2, Jan. 10, 2002 (Attachment 6).

[15] *Id.*

[16] Susan Ness, Op-Ed, *No: Entry Will Deter Local Competition*, THE RECORD, Jan. 8, 2002 at L13 (Attachment 7).

[17] 47 U.S.C. § 271; *infra* Section I.

[18] Application at 8, 10; Declaration of Lee L. Selwyn for the Ratepayer Advocate ¶¶ 5-6, 11-13 ("Selwyn Declaration") (Attachment 8) (*citing* Declaration of Lee L. Selwyn for the Ratepayer Advocate Before the New Jersey Board of Public Utilities ¶ 27 (Oct. 22, 2001) ("Selwyn BPU Declaration") (Attachment 8, Att. 3)); *see also* Martha McKay, *BPU Opens Hearings on Verizon Expansion*, THE RECORD, Nov. 6, 2001, at L-6 (Attachment 9).

carriers, not a single such carrier was offering residential service.[20] Moreover, the recent rash of bankruptcies by competitive carriers, including voice providers WinStar and Teligent and advanced services providers NorthPoint, Rhythms and Covad, further diminishes the prospects for competition in New Jersey.[21]

For Verizon-NJ to publicly deride the purposes of the 1996 Act in an evident attempt to seek greater monopoly advantage sends a warning to all policymakers in this important field. Let us not respond by supporting Verizon's attempt to stifle competition by retreating to the old, failed monopoly system of telecommunications. Instead, we should encourage a vibrant marketplace with new opportunities and technologies. Let the policy guiding the breakup of AT&T and the development of competition in the long distance marketplace – bringing lower rates and new technologies to consumers – remain the regulator's goal for the local exchange marketplace. And let us follow the wise advice of economist Vijay Vaitheeswaran, that to reach the goals of utility competition, *regulators must remain vigilant during the transition process.* Until the time is ripe for Verizon-NJ to enter the long distance marketplace – *i.e.*, until effective competition really exists in the local marketplace with true consumer choice – consumers still require the Commission to maintain and enforce the incentives necessary to open that market.

The statements of Verizon CEO Seidenberg provide a wake-up call for the Commission. They stand as a public acknowledgment of Verizon's attempts to thwart the development of competition in the local telecommunications markets. However, monopoly providers seeking to shut out competitors should not be permitted to dominate the market.

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[19] Application at 8.

[20] Application, App. B, Tab 5, BPU 271 Proceeding, 11/05/01 Hearing Transcript (Redacted), T:19:12-20:5.

The crux of the instant proceeding is whether the Commission will follow the construct of the 1996 Act and require Verizon-NJ to irrevocably open its local telecommunications markets to competition before it approves Verizon-NJ's entry into the lucrative long distance market. As the Ratepayer Advocate will show in these comments, the record supports only one conclusion: Verizon-NJ has yet to demonstrate that its local markets are open to competition, and has made no showing that any of the competition it claims to see will persist. Therefore, it is premature for the Commission to approve Verizon-NJ's section 271 application.

* * *

These Comments are organized as follows. This Introduction established the proper context for the Commission's analysis – the status of competition in the local market. Section I of the Discussion sets forth the proper legal standard for the Commission's analysis, focusing on the independent public interest requirements of this standard. Section II demonstrates that Verizon-NJ failed to comply with Track A of section 271. Section III shows that Verizon-NJ failed to satisfy item ii of the competitive checklist. Section IV demonstrates that Verizon-NJ failed to satisfy its public interest burden. Finally, in Section V, the Ratepayer Advocate explains why the Commission should not approve the Application unless Verizon-NJ is subject to full structural separation of its retail and wholesale activities or functional/structural separation accomplished via a strong code of conduct.

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[21] *See, e.g.*, Andrew Backover, *As Dot-coms and Telecoms Crash, the Fallout Lands on Main Street*, USA TODAY, June 25, 2001, at B.01 (Attachment 10); Dinah Wisenberg Brin, *Covad Bankruptcy Latest in Series for DSL Wholesalers*, DOW JONES NEWS SERVICE, Aug. 7, 2001 (Attachment 11).

DISCUSSION

I. SECTION 271 IMPOSES A STRICT LEGAL STANDARD ON VERIZON-NJ

A. Verizon-NJ Must Satisfy *All* Section 271 Requirements

Section 271 of the 1996 Act sets forth specific criteria that regional bell operating companies ("BOCs"), in this case Verizon-NJ, must satisfy if they are to receive permission to provide in-region, interLATA telecommunications services.[22] The purpose of section 271 is for BOCs to first open their local markets to competition in order to subsequently receive permission to enter the competitive long distance market.[23] Indeed, the Commission explicitly recognized the key Congressional goal that BOCs must irreversibly open their local markets when it stated in evaluating an earlier section 271 application that, "[i]n order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets."[24] Congress required this sequence of events because any other would be fundamentally unfair. Thus,:Senator Dorgan noted,

> The Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.[25]

As the Commission has long recognized, this logical progression– first the BOC opens its local market, then it is permitted to enter the long distance market – is a crucial predicate to the success of the 1996 Act.

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[22] 47 U.S.C. § 271.

[23] *E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order ¶ 3 (1997) ("FCC MI 271 Order").

[24] *Id.* ¶ 18.

[25] 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan) (quoted in *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region,*

> Through this statutory provision [Section 271], Congress required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services. Section 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets.
>
> By requiring BOCs to demonstrate that they have opened their local markets to competition before they are authorized to enter into the in-region long distance market, the 1996 Act enhances competition in both the local and long distance markets.
>
> . . .
>
> If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before the passage of the 1996 Act. . . . Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach – that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute, which requires BOCs to prove that their markets are open to competition before they are authorized to provide in-region long distance services.[26]

Verizon-NJ, therefore, should not be granted long distance authority in New Jersey until it has opened its local markets to competition.

Section 271 approval is contingent upon Verizon-NJ's demonstration that: (1) it either has interconnection agreements under which one or more competitors provide local exchange service in *both* the residential and business markets ("Track A") or, if no such competitors exist, it offers generally available terms and conditions under which facilities-based residential and

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InterLATA Services in Louisiana, 13 FCC Rcd 20599, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order ¶ 3 n. 6 (1998) ("FCC LA II 271 Order").

[26] FCC MI 271 Order ¶¶ 14-15, 18 (footnotes omitted) (emphasis in original); *see* FCC LA II 271 Order ¶ 3; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, CC Docket No. 99-295, FCC 99-404 ¶ 3 (1999) ("FCC NY 271 Order").

business competitors could provide competitive services ("Track B");[27] (2) it complies with each of the fourteen (14) point checklist items;[28] (3) it would implement the requested long distance authority in accordance with the separate affiliate and other safeguards of section 272;[29] *and* (4) its provision of long distance services would be fully "consistent with the public interest, convenience, and necessity."[30] Thus, according to the express language of the statute, *each* of these criterion is an essential element to section 271 approval, and each of these criterion must necessarily be reviewed by the Commission.[31]

Accordingly, the Commission in analyzing previous section 271 applications has found that a BOC must prove by a preponderance of the evidence that it has fully met each criterion.[32] Further, the Commission repeatedly emphasized that the burden of persuasion falls firmly on the applicant. "Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied."[33]

This burden is absolute. For example, in denying BellSouth's second Louisiana section 271 application, the Commission determined that section 271 requires that "[a] BOC must plead,

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[27] 47 U.S.C. §§ 271(c)(1)(A-B). In its Application, Verizon-NJ asserts only that it satisfies Track A. Application at 6-13.

[28] 47 U.S.C. § 271(c)(2)(B).

[29] 47 U.S.C. § 272.

[30] 47 U.S.C. § 271(d)(3)(C).

[31] *See, e.g., Sprint Communications Co. L.P. v. FCC*, 2001 U.S. App. LEXIS 27292, at *3-*4 (Dec. 28, 2001) ("Sprint v. FCC"); FCC LA II 271 Order ¶ 13; FCC MI 271 Order ¶ 9; FCC NY 271 Order ¶ 18; *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, IntraLATA Services in Arkansas and Missouri*, CC Docket No. 01- 194, FCC 01-338, Memorandum Opinion and Order at App. D ¶ 3 (rel. Nov. 16, 2001) ("FCC AK/MO 271 Order"); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01- 138, FCC 01-269, Memorandum Opinion and Order at App. C ¶ 3 (rel. Sept. 19, 2001) ("FCC PA 271 Order").

[32] *See* FCC MI 271 Order ¶ 45; FCC LA II 271 Order ¶ 59; FCC NY 271 Order ¶ 47; *see also* 47 U.S.C. § 271(d)(3).

[33] FCC MI 271 Order ¶ 43; *see id.* ¶ 43 n. 84 (burden of persuasion); *e.g.*, FCC NY 271 Order ¶¶ 47-48.

with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met."[34] In fact, a BOC can fail to satisfy this burden even if its section 271 application is unopposed.

> Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.[35]

Thus, failure by Verizon-NJ to prove any one of these criteria requires that Verizon-NJ's section 271 application be denied.[36]

Finally, Verizon-NJ must prove that each criterion is satisfied at the time of its application.[37] Evidence submitted after the initial application is generally to be accorded no weight, and *promises of future compliance may not be relied upon.*[38]

> [W]e find that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region, interLATA entry, a BOC must support its applications with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.[39]

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[34] FCC LA II 271 Order ¶ 52.

[35] FCC MI 271 Order ¶ 43; FCC LA II 271 Order ¶ 51 (re-emphasizing same); FCC NY 271 Order ¶ 47; FCC PA 271 Order, App. C ¶ 5; *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, IntraLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order ¶ 46 (rel. Jan. 22, 2001) ("FCC KS/OK 271 Order"), remanded on other grounds, Sprint v. FCC, *supra* note 31.

[36] 47 U.S.C. § 271(d)(3) ("The Commission shall not approve the authorization requested . . . unless it finds that" these criteria are met); FCC LA II 271 Order ¶¶ 11, 13 ("The statute directs that the Commission 'shall not approve' the requested authorization unless it finds that the criteria specified in section 271(d)(3) are satisfied."); see FCC MI 271 Order ¶ 6.

[37] *E.g.*, *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, 16 FCC Rcd 6923, 6925, 6927, DA 01-734, Public Notice (March 23, 2001)("Updated 271 Public Notice"); *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, 11 FCC Rcd 19706, 19709, FCC 96-469, Public Notice (1996) ("Dec. 6 Public Notice").

[38] Dec. 6 Public Notice, 11 FCC Rcd. at 19709; FCC MI 271 Order ¶¶ 51, 55.

[39] FCC MI 271 Order ¶ 55 (emphasis in original).

Moreover, Verizon-NJ must demonstrate not only that it is in full compliance at the time it files its application, but it must show that it will remain in compliance with section 271 if its application is granted.

> It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance.[40]

Verizon-NJ has failed to prove that its section 271 application satisfies the statute. Verizon-NJ has not demonstrated that it faces facilities-based residential competition, as required under Track A.[41] Verizon-NJ also did not prove that it satisfies checklist item ii.[42] Finally, and most significantly, Verizon- NJ failed to show that the grant of its application would be in the public interest.[43] As the FCC has recognized, the failure to satisfy any one of these criteria by itself requires rejection of a section 271 application.[44] That Verizon-NJ fails to satisfy each of them simply reinforces the result called for by the statute – the Commission should reject Verizon-NJ's Application.[45]

B. The Public Interest Test Is Crucial to the Commission's Section 271 Evaluation

One of the four criteria that Verizon-NJ must satisfy in order to receive section 271 authority is the public interest test.[46] As the Commission has consistently and repeatedly stated in its section 271 orders, the public interest test is a requirement separate from the fourteen (14)

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[40] *Id.* ¶ 22.

[41] *Infra* Section II.

[42] *Infra* Section III.

[43] *Infra* Section IV.

[44] *See* FCC MI 271 Order ¶ 6; FCC LA II 271 Order ¶¶ 11, 13, 48.

[45] *See* FCC MI 271 Order ¶ 6; FCC LA II 271 Order ¶¶ 11, 13, 48.

[46] 47 U.S.C. § 271(d)(3); *see* Sprint v. FCC, *supra* note 31, at *3, *7, *10-*14, *36.

point checklist and the other section 271 criteria, but equally necessary to section 271 analysis in compliance with the 1996 Act.

> [W]e reaffirm the Commission's earlier decision that section 271 relief may be granted only when: (1) the competitive checklist has been satisfied; *and* (2) the Commission has independently determined that such relief is in the public interest.[47]

Congress intended the public interest test to form the basis of the Communications Act, including the 1996 Act amendments, such as section 271.

> The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill.[48]

In its deliberations preceding the enactment of the 1996 Act, Congress expressly rejected an amendment that would have enabled compliance with the checklist in and of itself to satisfy the public interest test.[49] Rather, as the Commission has previously found, checklist compliance (which does not exist in this proceeding) does not guarantee that barriers to entering the local telecommunications market have been eliminated.

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition.[50]

The D.C. Circuit recently reinforced the high premium that the statute places on the Commission performing an independent public interest examination that places particular

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[47] FCC LA II 271 Order ¶ 361 (emphasis added); *see, e.g.*, FCC PA 271 Order, App. C ¶ 71 ("the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."); FCC NY 271 Order ¶¶ 422-423; FCC MI 271 Order ¶¶ 389-390.

[48] S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995) (quoted in FCC MI 271 Order ¶ 385 n. 992).

[49] FCC MI 271 Order ¶ 389 n. 1004 and accompanying text (citing 141 Cong. Rec. S7971, S8043 (1995)).

[50] *Id.* ¶¶ 389-390.

emphasis on competitive analysis.[51] The public interest inquiry required by section 271 is an expansive one.[52] In carrying out this inquiry, the Commission has broad discretion to consider any factor relevant to assessing whether BOC entry into the long distance market is in the public interest.[53] Moreover, the Commission has specifically requested that commenters identify any factor they deem relevant to the public interest determination.

> We encourage interested parties . . . to identify other factors that we might consider in the context of a specific application, and the weight that we should attach to the various factors, in making this assessment.[54]

Further, the Commission has provided substantial guidance as to some of the possible areas in which it desires detailed input from commenters as part of its public interest evaluation.[55] As part of the public interest evaluation, the Commission should examine commenters' views on whether the local telecommunications market is irrevocably open to competition.[56] Additionally, the public interest review must include analysis of whether competition currently exists and will continue to exist in the local market.[57]

Moreover, this evaluation should analyze the actual amount of competitive services being provided "to different classes of customers (residential and business)," and the scope of

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[51] Sprint v. FCC, *supra* note 31, at *3, *7-*15, *36; this important decision is discussed further in Section IV., *infra.*

[52] FCC MI 271 Order ¶ 385; *see also* FCC LA II 271 Order ¶ 365.

[53] FCC MI 271 Order ¶¶ 383-422; FCC LA II 271 Order ¶ 362.

[54] FCC MI 271 Order ¶ 398.

[55] *E.g.*, FCC MI 271 Order ¶¶ 383-422; FCC PA 271 Order, App. C ¶ 71.

[56] *E.g.*, FCC PA 271 Order, App. C ¶ 71.

[57] FCC LA II 271 Order ¶ 361. According to former Commissioner Susan Ness, this is the best test of whether the public interest has been met.

> *Indeed, the best test whether a Bell company has met the [1996 Act's] requirements to open the local market is this: do consumers have a real choice of local service providers?* Especially now, six years after the [1996 Act] was passed, one would expect that if the local market were truly open we would see high levels of actual competition in the residential market by service providers using a variety of forms of market entry.

Ness, *supra* note 16 (emphasis added) (Attachment 7).

competition "in different geographic regions (urban, suburban, and rural)."[58] Verizon-NJ's obligation, therefore, is to show not isolated pockets of competitive effort, but competition that benefits all classes of consumers in all areas of the state.

Despite this clearly established, consumer-oriented principle, Verizon-NJ asserts that "allegations about the state of local competition in New Jersey are inapposite as a legal matter,"[59] and that it "disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public-interest inquiry."[60] These positions misstate the law, and if adopted would eviscerate the public interest inquiry. Likewise, Verizon-NJ's claim that the long distance market, rather than the local market, should be the focus of the public interest inquiry not only misreads the statute, but ignores Commission precedent rejecting this position.[61] As the Commission stated in its first section 271 evaluation:

> We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition . . . In adopting section 271 Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ [Modified Final Judgement] on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.[62]

Accordingly, the Commission's analysis of the state of local competition in New Jersey is not only appropriate, it is essential.[63] Failure to include such an examination would fatally undermine the Commission's public interest analysis. This, in turn, would render the

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[58] FCC LA II 271 Order ¶ 391.

[59] Application at 81.

[60] Application at 77 n. 70.

[61] *Id*, at 77 n. 70.

[62] FCC MI 271 Order ¶ 386.